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No. 84-1538

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

ALEXANDRA FISHER, *et al.*,
Appellants,

v.

CITY OF BERKELEY, *et al.*,
Appellees,

On Appeal from the Supreme Court of California

BRIEF AMICUS CURIAE OF THE COALITION FOR COMPETITION IN APARTMENT RENTALS † IN SUPPORT OF APPELLANTS

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BRIEF AMICUS CURIAE OF THE COALITION FOR COMPETITION IN APARTMENT RENTALS IN SUPPORT OF APPELLANTS

INTEREST OF AMICUS CURIAE

The Coalition for Competition in Apartment Rentals is comprised of a group of 33 apartment house owners in California who own more than 17,700 units in the cities of Los Angeles, West Hollywood, and Santa Monica, California.[1] These three cities have adopted rent control ordinances which raise the same issues as the one enacted in Berkeley,[2] and therefore the members of the *amicus* Coalition have a direct financial interest in the outcome of this case. The Coalition was formed for the specific purpose of presenting its views in this case.

This brief is being filed because there are a number of matters that at least to date have not been sufficiently

[1] A copy of the Agreement instituting the Coalition is attached hereto as Appendix A.

[2] *See* Los Angeles, Cal., Municipal Code ch. XV (1984); Santa Monica, Cal., Charter art. XVIII (1984); and West Hollywood, Cal., Ordinance 59 (June 27, 1985), many of the provisions of which are far more restrictive than those in Berkeley's ordinance.

discussed by the parties and other *amici*. Among these are the extent to which the California Legislature has heretofore addressed the issue of rent control, Congress's understanding and intent in regard to the present state of the law relating to municipal exemption from the antitrust laws, the possibility that this Court might apply a standard of legality under the antitrust laws to municipalities different from the one it applies to private parties, the reason why a state Legislature might well choose to allow cities within the state to be answerable to the antitrust laws for anticompetitivc conduct, and the importance of allowing Congress and the states to determine whether, how, and to what extent traditional *per se* rules should apply to municipal price fixing.

Both Appellants and Appellees have consented to the filing of this brief.

STATEMENT OF THE CASE

With two exceptions, the statement of the case, including the way the City of Berkeley's rent control ordinance operates, has been adequately set forth by Appellants.

1. No brief to date has adequately delineated the decision below. Because the opinion by the majority of the California Supreme Court is so lengthy and convoluted, and because its reasoning is central to a resolution of this case, we explain briefly our understanding of how the court reached the result it did.

The court began with the proposition, established in one of its prior cases,[3] that although California has " 'no state rent control statute' ", cities have the general police power to enact rent control ordinances pursuant to a California constitutional provision conferring upon them the authority to enact " 'all local, police, sanitary, and other ordinances and regulations not in conflict with gen-

[3] *Birkenfeld* v. *City of Berkeley*, 17 Cal. 3d 129, 550 P.2d 1001, 130 Cal. Rptr. 465 (1976).

eral laws.' "[4] After then reviewing a number of this Court's decisions (*id.* at A-7 - A-12), the court below decided that it need not reach the "state action exemption principle" *unless* there was a conflict between the Sherman Act, 15 U.S.C. §§ 1 *et seq.*, and the ordinance at issue. *Id.* at A-12.

Turning to the Sherman Act, the court attempted to discern the principal justifications for the *per se* rule as applied to price fixing. It thought that these justifications were two-fold: the "economic reliability" assumption—that price fixing virtually never has redeeming features—and the "ease of administration" assumption—that it is easier for the judiciary to administer the rule on a *per se* basis than by supervising the reasonableness of prices. *Id.* at A-21 - A-26. The court concluded that neither of these justifications applies to cities. As to the "economic reliability" assumption, nothing suggested that Berkeley was acting for its "own selfish purposes with a view toward securing market control and hence price control in the future"; instead, Berkeley's *purpose* was to serve the public welfare. *Id.* at A-23. As to the "ease of administration" assumption, the court concluded that the burden of administering rent controls would be borne by the city rather than the courts, and, in any event, the burden was outweighed by the legitimate use of the city's police power. *Id.* at A-23 - A-26.

Turning to the Rule of Reason, the court used essentially the same reasoning it had applied to the *per se* rule: whereas private business is motivated by the prospect of increased profits, cities are motivated by the promotion of the public welfare. Cities are therefore different, a different rule should apply to them, and the Rule of Reason is not applicable. *Id.* at A-26 - A-28.

Having thus rejected the principles established by this Court for the application of the Sherman Act, the California court developed its own, entirely different, stand-

[4] Appendix to Jurisdictional Statement ("JS App.") A-6, quoting *Birkenfeld*, 17 Cal. 3d at 141, and Cal. Const. art. XI, § 7.

ard for testing whether the Berkeley ordinance was consistent with the Sherman Act. The test it evolved, purportedly based in part on this Court's decisions under the Commerce Clause, U.S. Const. art. I, § 8, cl. 3, was whether the municipal regulation has a proper local purpose, is rationally related to the municipality's legitimate exercise of its police power, and operates in an even-handed manner. If the ordinance meets this test, it must be upheld unless the plaintiff can demonstrate that the city's purposes "could be achieved as effectively by means that would have a less intrusive impact on federal antitrust policies." *Id.* at A-31; footnote deleted. How this could be proven was not explained (see particularly *id.* at A-31 n.28). Since Berkeley's ordinance has beneficial purposes, and no one had demonstrated that it failed to operate in an even-handed manner, it was consistent with federal antitrust policies. Accordingly, the antitrust issue was finally disposed of in these terms: "Because we determine that plaintiffs have not established a conflict with the [Sherman] Act, we do not address whether the ordinance may be exempt from antitrust scrutiny under *Boulder*." *Id.* at A-35. The California court then proceeded to consider what it terms "Rent Control Issues", such as the adequacy of the procedure for rent adjustments. Thus, it never considered the applicability of the Sherman Act to the Berkeley ordinance, and the decision was based entirely on a revision of federal antitrust standards.

2. Only one other factual point need be clarified. As noted above, the majority below conceded that California has " 'no state rent control statute' " (JS App. A-6, quoting *Birkenfeld*, 17 Cal. 3d at 141), and the dissent pointed out: "It is uncontradicted that the California Legislature has not directly spoken on the subject of rent control, much less 'clearly articulated and affirmatively expressed' any policy favoring local ordinances such as Berkeley's." JS App. A-82. In point of fact, however, California has spoken about rent controls, and in a decidedly negative fashion.

The California Planning and Zoning Law, in §§ 65300-65589, sets forth a comprehensive housing scheme, the intent of which is to facilitate the improvement and development of housing and at the same time place primary responsibility for this goal on local counties and cities (§§ 65300, 65580, 65581). Each chartered city, for example, is directed to adopt a plan for its physical development containing the housing elements established by the Legislature (§ 65300). The program envisages five-year schedules of action, the identification of sites for emergency housing, the promotion of housing opportunities for every one regardless of race, religion, and sex, the provision of housing affordable to low- and moderate-income households, and the like. But this comprehensive plan also contains this key provision (§ 65589(b)):

> Nothing in this article shall be construed to be a grant of authority or a repeal of any authority which may exist of a local government to impose rent controls or restrictions on the sale of real property.

Similarly, the California Housing and Home Finance Act, part of the state's Health and Safety Code, was enacted to address the statewide housing problems faced by households of low and moderate income. The Act assigns principal responsibility for coordinating federal-state housing programs to the California Department of Housing and Community Development ("Department"), and responsibility for providing financing assistance to housing developments for persons and families of low or moderate incomes to California's Housing Finance Agency ("Agency"). Qualified individuals, groups, or business entities, denominated as "housing sponsors" by the Act, may seek authority from the Department or the Agency to construct, acquire, or rehabilitate housing developments within the state. Qualified individuals may also seek "housing sponsor" status in order to obtain property improvement loans. Housing sponsors who receive financial assistance from the Department or the Agency must enter into "regulatory contracts" to ensure that the requirements of the Act will be satisfied.

A key section of the Act, § 50202, addresses the issue of rent controls:

> Nothing in this division shall authorize the imposition of rent regulations or controls except by a regulatory contract between the agency or the department, as the case may be, and its housing sponsor or developer, for housing units financed, insured, coinsured or otherwise assisted by the agency or by the department, as the case may be. Except for the federal government, the right to control rent on such units shall reside exclusively in the agency or the department, as the case may be, and the housing sponsor or developer so regulated shall not otherwise be subject to controls on rent imposed by any state or local agency or other local public entity.

Finally, the California Legislature has addressed the subject of rent controls in the California Community Care Facilities Act, Cal. Health & Safety Code §§ 1500-1567.9 (Deering 1982 & Supp. 1985). That Act establishes a statewide service system of community care for mentally ill and developmentally and physically disabled children and adults. These goals are to be reached primarily through stringent licensing requirements and continuing supervision by state authorities. Among the provisions of the Act is the following directive addressing rent controls:

> § 1518.
>
> (a) Nothing in this chapter shall authorize the imposition of rent regulations or controls for licensed community care facilities.
>
> (b) Licensed community care facilities shall not be subject to controls on rent imposed by any state or local agency or other local government or entity.

Thus, while it may well be, as the majority below observed, that the California Constitution allows, or at least does not prohibit, the municipal imposition of rent controls, the message of the Legislature, to the extent it has spoken on the subject, has been entirely negative. Rather than directing, condoning, encouraging, supervising, adopting or enforcing the imposition of rent controls, the state itself has, in every case where it foresaw that municipal controls would be imposed in relation to specific programs or projects, prohibited their imposition. There is *no* provision in any statute in the state approving the enactment of rent controls by any county, city or agency.

SUMMARY OF ARGUMENT

Under the state action doctrine formulated by this Court in *Parker* v. *Brown*, 317 U.S. 341 (1943), states are exempted from antitrust liability. Private parties who are compelled to violate the antitrust laws by clearly articulated and affirmatively expressed state policies are also exempted when they are actively supervised by the state. Municipalities are themselves exempted when there exists a clearly articulated and affirmatively expressed state policy covering the municipal conduct in question.

In the present case, the City of Berkeley has directed private parties to charge no more than fixed sums for rentals to tenants—conduct that, if undertaken by private parties acting alone but in concert, would clearly be violative of the Sherman Act under the *per se* rule. Because the State of California not only has failed to adopt a clearly articulated and affirmatively expressed policy allowing rent control, but has expressed a negative attitude toward such controls, and because there is no active *state* supervision and implementation of Berkeley's rent control ordinance, the ordinance should be invalidated on the basis of this Court's existing precedent.

In considering the legislation that ultimately was enacted as the Local Government Antitrust Act of 1984, Congress deliberately changed the substantive antitrust law as applied to municipalities and private parties acting at a municipality's express direction. Although it immunized municipalities from awards of civil damages in antitrust cases, it *rejected* all attempts to exempt cities from antitrust injunctive relief under existing standards, as well as attempts to impose on them only a Rule of Reason approach. Thus, this Court is the beneficiary of re-

cent congressional action demonstrating that Congress has considered and rejected such changes in the status of municipalities under the antitrust laws.

Even if the Court were to adopt a Rule of Reason-type approach to cities, on the theory that a city asserts public interest considerations not present in private price-fixing cases, those considerations would be outweighed in this case by the many anticompetitive aspects of rent controls. However, the Court should not adopt such a modified antitrust approach to cities, not only because Congress has rejected it, but because the states themselves can easily protect municipalities from any antitrust liability by adopting clearly articulated state policies addressing the conduct to be regulated and by instituting a program of active supervision of the private party "actors." There are many reasons (supported by virtually all economists) why a state might conclude that rent controls are not in the best interest of its citizens, and California is one of those that has chosen not to extend any exemption to cities within its borders. That being so, this Court should assume that the California Legislature intends cities like Berkeley to be subject to normal antitrust prohibitions—in this case, the *per se* rule.

In any event, the test articulated by the California Supreme Court in an attempt to circumvent the federal antitrust laws is wholly unworkable, raises more questions than it answers, and would enmesh both federal and state courts in a legal quagmire.

ARGUMENT

We submit that the California Supreme Court was plainly wrong in jettisoning almost a century worth of case law interpreting the antitrust laws and instead developing a test so broad that any municipal regulation rationally related to any legitimate goal with any sort of means-end fit will withstand judicial scrutiny. We recognize that this Court may be seeking some kind of formulation applicable to cities that stops short of outright application of a *per se* rule. But, as we show below, Con-

gress has demonstrated as recently as last year that it fully understands the current state of the law as it relates to cities, and it has deliberately chosen *not* to immunize them from injunctive relief but rather only to insulate them from civil damages. We also show that each state by now knows how to grant an antitrust exemption to the cities within its borders, and we list some of the many reasons why a state might choose not to do so. California is one of those states that has not sanctioned the type of anticompetitive activity at issue in this case. Therefore, we respectfully submit that if anything other than a *per se* application of the antitrust law is to be applied to the price fixing engaged in by cities such as Berkeley, that choice should be made either by Congress exercising its power under the Commerce Clause, or by state Legislatures exercising their powers consistent with the Supremacy Clause, U.S. Const. art. VI, cl. 2,—all acting within the guidelines already laid down by this Court.

To establish a factual context for these points, we first review briefly relevant portions of the principal cases treating the so-called "state exemption" doctrine.

In *Parker* v. *Brown*, 317 U.S. 341 (1943), the Court established the general proposition that anticompetitive action carried out by the state *itself* is exempted from coverage by the federal antitrust laws.

In *Goldfarb* v. *Virginia State Bar*, 421 U.S. 773 (1975), the Court held a minimum-fee schedule enforced by a state Bar in violation of the Sherman Act. Because there was no state law *requiring* the anticompetitive activities, the minimum-fee schedule did not come within the *Parker* v. *Brown* exemption, even though the state Supreme Court's ethical codes mentioned advisory fee schedules. "[A]nticompetitive activities must be compelled by direction of the State acting as a sovereign" before they are exempt. *Id.* at 791.

However, the Court in *Bates* v. *State Bar of Arizona*, 433 U.S. 350 (1977), held that an otherwise impermissi-

ble ban on lawyer advertising imposed by the Arizona Supreme Court came under the *Parker* v. *Brown* doctrine because the court was a state agency and the restraint was thus compelled by the state. The state policy was (a) clearly articulated and affirmatively expressed as state policy and (b) actively supervised by the state agency.

In *City of Lafayette* v. *Louisiana Power & Light Co.*, 435 U.S. 389 (1978), a majority held that the Sherman Act applies to cities, as opposed to states, and a plurality concluded that the *Parker* v. *Brown* protection accorded to *states* does not apply to *cities* which themselves violate the antitrust laws unless they are acting pursuant to state policy in displacing competition with regulation or monopoly public service. There must be evidence, said the plurality, that the state "authorized or directed" the city to act as it did. *Id.* at 414. It would appear, in other words, that the plurality took one part of the two-part test applied to a state agency in *Bates* and made it applicable to cities which were themselves the antitrust violators. In a footnote, however, the plurality said that "[i]t *may be* that certain activities which *might appear* anticompetitive when *engaged in* by private parties, take on a different complexion when *adopted* by a local government." *Id.* at 417 n.48; emphasis added.[5]

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[5] The plurality cited a law review article as a basis for this suggestion. However, the article, which of course was written before all of this Court's post-*Lafayette* decisions, was essentially a tract *against* the expansion of the state exemption. Posner, *The Proper Relationship Between State Regulation and the Federal Antitrust Laws*, 49 N.Y.U. L. Rev. 693 (1974). For example:

> This article begins from the position that, absent persuasive reasons to the contrary, state regulation should be invalidated whenever it achieves results which, privately arranged, would violate the antitrust laws. * * *
>
> * * * *
>
> Moreover, this article advocates a narrow reading of the federalism justification. This justification depends on supposed congressional intent not to interfere lightly with important state interests. The necessary congressional intent should be

New Motor Vehicle Bd. v. *Orrin W. Fox Co.*, 439 U.S. 96 (1978), dealt with a state statute setting up a regulatory scheme which allegedly initiated restraints on trade. The Court applied *Parker* v. *Brown* because the statute "clearly articulated and affirmatively expressed" an intent to displace unfettered business freedom. *Id.* at 109. However, in *California Retail Liquor Dealers Ass'n* v. *Midcal Aluminum, Inc.*, 445 U.S. 97 (1980), which also dealt with a state statute, the Court held that *Parker* v. *Brown* did not apply because the state, although clearly articulating and affirmatively expressing a state policy of price setting through resale price maintenance, did not actively supervise that policy. The Court interpreted *Lafayette* as having adopted both parts of the *Bates* test (*id.* at 105), and it said that while the state authorized price setting and enforced prices effectuated by private parties, it did not establish the prices themselves, review their reasonableness, regulate their terms, or monitor them. *Id.* at 105-106.

In a case similar in some respects to the instant one, *Community Communications Co.* v. *City of Boulder*, 455 U.S. 40 (1982), the Court held that *Parker* v. *Brown* did not exempt from antitrust scrutiny a municipal ordinance allegedly restricting a cable television company from expanding its business. This was because there was only a general "home rule" delegation of powers to Colorado cities and not the "clear articulation and affirmative expression" of specific state policy that was required. As to the restrictions under scrutiny, the state's position was

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> inferred in only two situations. The first is public utility regulation of traditionally regulated industries. The second is state economic regulation which can find some recognition or support in federal legislation outside the antitrust areas. [*Id.* at 703, 709.]

Significantly, in discussing the Fourth Circuit's opinion in *Goldfarb*, the author stated: "This approach should be rejected. If followed, it could be used to justify any economic regulation so long as it can be tacked on to health and safety regulation." *Id.* at 714.

The same reasoning, of course, applies in this case.

one of "mere *neutrality*". *Id.* at 55; emphasis in original. The Court reserved the question of whether the ordinance at issue also must or could satisfy *Midcal*'s active supervision test. *Id.* at 51-52 n.14. As in *Lafayette*, the Court in a footnote also reserved the issue of whether " 'certain activities which might appear anticompetitive when engaged in by private parties, take on a different complexion when adopted by a local government.' " *Id.* at 56-57 n.20, quoting *Lafayette*, 435 U.S. at 417 n.48.

In *Rice* v. *Norman Williams Co.*, 458 U.S. 654 (1982), the Court established the rule that a state statute is preempted by the Sherman Act only when it mandates or authorizes private conduct that *necessarily* constitutes an antitrust violation in all cases, or places an irresistable pressure on private parties to commit antitrust violations. *Id.* at 661. Such is the case when the conduct enforced by the statute would be a *per se* violation of the Sherman Act (*id.*), which it was not in that case. Thus, *Midcal*, a *per se* case, was distinguished. *Id.* at 659-660. Significantly, the Court noted that "[i]t is not surprising * * * that a statute which requires practices *per se* illegal under the Sherman Act may be subject to a facial challenge under the Supremacy Clause." *Id.* at 659-660 n.5.

In *Town of Hallie* v. *City of Eau Claire*, 105 S. Ct. 1713 (1985), a tying case, the state statute declared a "clearly articulated and affirmatively expressed" policy to displace competition with regulation in the area of sewage collection by cities. *Id.* at 1717-1720. The Court applied *Parker* v. *Brown* and ruled that when the "actor" is the city itself rather than a private party, active state supervision is not necessary in order to obtain exemption from the antitrust laws. *Id.* at 1720. In other words, the Court held that the second prong of the *Midcal* test was not applicable to a city acting pursuant to state policy when it directly restrains competition.

The Court pointed out that whereas a private party may act only to further his own interests, there is little danger that a city *following state policy* will do so. The

Court, however, was careful to note one of the dangers of a city *not* following state policy: "it will seek to further purely parochial public interests at the expense of more overriding state goals." *Id.* at 1721. The Court added this somewhat enigmatic footnote to its opinion: "In cases in which the actor is a state agency, it is likely that active state supervision would also not be required, although we do not here decide that issue. Where state or municipal regulation of a private party is involved, however, active state supervision must be shown, even where a clearly articulated state policy exists." *Id.* at 1720 n.10.

Finally, in *Southern Motor Carriers Rate Conference, Inc.* v. *United States*, 105 S. Ct. 1721 (1985), decided the same day, the Court dealt with common carriers submitting joint rate proposals to state agencies. Each of the states involved allowed such carriers to submit joint rates, although the carriers were free to submit individual rates. The Court applied *Parker* v. *Brown* and the two-part test of *Midcal*—a clearly articulated state policy and active state supervision. Since the states had sufficiently indicated their intention "to displace competition in a particular field with a regulatory structure" (*id.* at 1731), and state agencies actively supervised the joint rates, the private parties were immune from antitrust liability. The Court emphasized, however, that the joint rate policy had been "approved", or "clearly sanctioned", by each state legislature (*id.*), even though one state had not specifically referred to joint rates.

While, by the Court's own admission, its opinions in this area have not always been consistent in every respect, the following generalizations appear to be warranted from the cases outlined above:

Where a state itself violates an antitrust law, or clearly articulates and affirmatively expresses a policy which compels private parties to violate the antitrust

laws, there is complete immunity.[6] When private parties are regulated by a state agency in a way which violates the antitrust laws, they are immune only so long as the agency is acting pursuant to clearly sanctioned state policy *and* the agency is actively supervising the private parties. When a city itself violates an antitrust law, it receives immunity only where it has acted pursuant to a clearly articulated and affirmatively expressed state policy, but there need be no active state supervision of its conduct. However, where a city directs the activities of private parties in a way that violates the antitrust laws, there is no immunity unless the conduct is carried out pursuant to clearly articulated and affirmatively expressed state policy *and* is actively supervised by the state. The instant case is covered by this last principle.

As noted above, *Town of Hallie* in a footnote set forth the "actor" standard, differentiating between cases where the city is the actor as opposed to those where private parties are the actors. It should make no difference in this case whether the city is regarded as the "actor" or whether the city is regulating private parties who themselves are the "actors", because in any event there is no "clearly articulated and affirmatively expressed" state policy that was being followed.[7] But the fact is that under this Court's formulation, Berkeley was not the "actor" (as it would be, for example, where it owned

[6] For ease of discussion, we use the term "immunity" to encompass the "exemption" and "preemption" standards articulated by the Court in its various opinions. *See Boulder*, 455 U.S. at 60-71 (Rehnquist, J., dissenting).

[7] The reason there is a measure of confusion on this point of who is the actor is that in *Boulder*, the Court treated the city as the actor and reserved the question of what rule would apply where private parties acted under the aegis of municipal regulation, and yet the city's anticompetitive action in that case was in restricting the expansion of a private company. In both that case and this one, it would appear that the antitrust offense occurred when the city compelled private parties to act, or prevented them from acting, in a way in which they wished to act and which would have allowed free market forces to operate.

all apartment units in the city and itself imposed and enforced uniform rentals). That being so, an added element is necessary in this case to legitimize the city's conduct: active state supervision. No matter how the posture of California law in regard to rent controls is characterized, no one can claim that the state of California actively "supervises" those controls.

Moreover, this case would clearly appear to be governed by the rationale of *Midcal*. In that case even a statute which clearly articulated and affirmatively expressed a price-setting state policy was found not to warrant *Parker* v. *Brown* exemption because the state failed to supervise the resulting prices. If a state itself cannot immunize price fixing without something more than an intent to do so, surely a city cannot. And here, of course, even the intent of the state is missing.

Despite these indicia that the instant case is covered by doctrine already put in place by the Court, we turn to the suggestion in the footnotes in *Lafayette* and *Boulder* that an issue akin to the one in dispute here may still be open.[8]

First, we note that by the use of the word "may be", the Court itself appears not to have been certain that the situation it was outlining (anticompetitive conduct by private parties adopted by local governments) should be treated any differently than that in which cities themselves act in an anticompetitive manner. Secondly, the Court described activities by private parties as those that "might appear" anticompetitive. Unlike the group boycott situation, where confusion reigns as to the proper application of the law,[9] there can be no uncertainty about whether the activities in the present case are anticompetitive. There is no clearer anticompetitive

[8] "It may be that certain activities which might appear anticompetitive when engaged in by private parties, take on a different complexion when adopted by a local government."

[9] *See Northwest Wholesale Stationers, Inc.* v. *Pacific Stationery & Printing Co.*, 105 S. Ct. 2613, 2619 (1985).

activity in the law than price fixing. Finally, the *Lafayette* and *Boulder* footnotes speak of activities "engaged in" by private parties which are "adopted" by a local government. That does not describe this case, for here the city imposed anticompetitive regulation on landlords against their will. The landlords did not seek to defend their activity on the ground that it was carried out pursuant to municipal policy, which in turn was adopted pursuant to state policy—the situation that we believe the Court had in mind in its footnotes. Instead, the city regulated in a way which the landlords sought to avoid.

Nevertheless, because the Court has raised a question as to whether there should be differing standards when cities are involved, we turn now to why Berkeley should not be allowed, on this record, to set a ceiling on prices in apartment rentals.

As noted above, the California Supreme Court, in rejecting the *per se* approach to the Berkeley ordinance, focused upon two of the justifications noted by this Court for the *per se* rule—that price fixing virtually never has redeeming features and that the rule is easier for courts to administer. Aside from the fact that the lower court greatly over-simplified this Court's rulings and the situation that will develop out of its own formulation,[10] it totally ignored the overriding justification for the *per se* rule as applied to price fixing—the pernicious *effects* of such a practice, as pointed to by this Court time and again.

In a long line of cases, the Court has made clear that Congress concluded in the Sherman Act that price fixing restricts and curtails normal competitive forces and the free play of the market, and that these forces, combined

[10] For example, the court correctly pointed out that Berkeley's rent control scheme is supervised by the city's Rent Stabilization Board, but then failed to give any meaningful consideration to the judicial costs of assessing the reasonableness of the Board's decisions in individual cases. *See, e.g., Arizona* v. *Maricopa County Medical Society*, 457 U.S. 332, 343-344 (1982), and *United States* v. *Trans-Missouri Freight Ass'n*, 166 U.S. 290, 331-332 (1897).

with free market play, produce on their own the most beneficial results for society as a whole. That is why a price fixer need not have monopoly power in order to violate the *per se* rule, and why neither a purpose nor the power to fix prices is necessary to make out a violation. It is why no overt act need be shown, why co-conspirators need not have available the means to carry out their price fixing, and why only a small part of commerce need be embraced in such a conspiracy. It is why it is irrelevant that only a price floor or ceiling is established and that the resulting prices actually fluctuate. It is why it makes no difference that the fixed prices are reasonable, that the price fixers have laudable objectives, or that the prices that are fixed produce beneficial results.[11]

Fixed prices are banned "because of their actual or potential threat to the central nervous system of the economy". *Socony-Vacuum Oil Co.*, 310 U.S. at 224-226 n.59. The decision to apply the *per se* rule turns on "'whether the practice facially appears to be one that would always or almost always tend to restrict competition and decrease output * * *.'" [12] And "[w]hatever may be its peculiar problems and characteristics, the Sherman Act, so far as price-fixing agreements are concerned, establishes one uniform rule applicable to all industries alike." *Id.* at 222.

[11] *E.g., United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 219-223 (1940); *Kiefer-Stewart Co.* v. *Joseph E. Seagram & Sons, Inc.*, 340 U.S. 211, 213 (1951); *Schwegmann Bros.* v. *Calvert Distillers Corp.*, 341 U.S. 384, 386 (1951); *Northern Pac. Ry. Co.* v. *United States*, 356 U.S. 1, 5 (1958); *Albrecht* v. *Herald Co.*, 390 U.S. 145, 151-154 (1968); *United States* v. *Topco Associates, Inc.*, 405 U.S. 596, 609-610 (1972); *Continental T.V., Inc.* v. *GTE Sylvania Inc.*, 433 U.S. 36, 49-50 (1977); *National Society of Professional Engineers* v. *United States*, 435 U.S. 679, 689 (1978); *Catalano, Inc.* v. *Target Sales, Inc.*, 446 U.S. 643, 647-650 (1980); *Maricopa County Medical Society*, 457 U.S. at 348-354.

[12] *Northwest Wholesale Stationers, Inc.* v. *Pacific Stationery & Printing Co.*, 105 S. Ct. at 2617, quoting *Broadcast Music, Inc.* v. *Columbia Broadcasting System, Inc.*, 441 U.S. 1, 19-20 (1979).

Thus, virtually all of the reasoning of the majority below runs directly counter to *per se* principles. Even though competition is restrained and output decreased, the California majority has focused on the intent, purpose, and objectives of the price fixers, and emphasized the flexibility of the fixed prices. It has substituted its judgment for that of Congress.

Appellees would have the Court now carve out an exception to the uniform *per se* rule even though the state has not articulated an affirmative policy toward rent control, and the effect of Berkeley's ordinance is to establish a ceiling on rents throughout the entire city. But the *effects* of the Berkeley ordinance are at least as harmful here as they would be in a case where prices are pegged to a particular level. As a matter of fact, the rent controls in this case are *more* pernicious than in the ordinary private-party price-fixing case, because (a) every landlord in the city is affected, whereas in many cases only a handful of competitors engage in the conspiracy; (b) municipal controls are more static and inflexible than in circumstances where competitors can easily change their joint positions; (c) individual competitors are not bound to their agreement by law but can deviate in price at will, whereas the controls applied here are enforced by the courts; and (d) in the ordinary case, at least the conspirators are acting in their own perceived self-interest in the market place, whereas here every competitor is acting against his will, and no market factors are brought into play at all. No amount of word-juggling can avoid the fact that the control of prices is *economic* regulation—not, as the California Supreme Court said, health and safety regulation [13]—and yet all available economic forces are suppressed.

There is no denying that the Court has moved toward a more liberal policy since its *Parker* v. *Brown* decision 43 years ago. The states are allowed greater leeway than originally anticipated in condoning municipal prac-

[13] *See* Posner, *supra* note 5, at 717.

tices, as well as practices by private parties, which unless exempted would clearly violate both the letter and the spirit of the antitrust laws. What the Court seems to be seeking is a middle ground which will allow the states the ability, without ritual incantation, to experiment with controlled or partially controlled economies through regulation, and at the same time not unduly encroach upon a congressionally-established free market system in interstate commerce. Nevertheless, limits have been imposed on this freedom, and for good reason.

There are two principal dangers in relaxing the standards of *Parker* v. *Brown* and its progeny beyond the point to which they have already been taken.

1. The Court appears to have assumed, since Congress has not reacted adversely to its decisions, that a relaxed standard is in accord with congressional wishes—that Congress has *intended* for the antitrust laws to stop short of curtailing certain state-endorsed public and private action. But as the Local Government Antitrust Act of 1984 [14] demonstrates, there are definite limits to this congressional intent, and one of them involves the very issue in this case: the exercise by *cities*, under the guise of state sanction, of a power which would be impermissible under the antitrust laws and which in fact has not been sanctioned or approved by the state. The legislative history of that Act is highly relevant for two reasons: It shows Congress's 1984 understanding of the state of the law, and it demonstrates that Congress does *not* intend for cities to take on the mantle of state authority without express direction by the state itself.

The Senate Bill, S. 1578, as originally introduced, would have provided that "The Federal antitrust laws shall not apply to any law or other action of, or official action directed by, a city * * * in the exercise of its regulatory powers * * * where such law or action is valid under State law * * *." *See* S. Rep. No. 98-593,

[14] Pub. L. 98-544, 98 Stat. 2750, 15 U.S.C. §§ 31-36, enacted October 24, 1984.

98th Cong., 2d Sess. 4 (1984). In other words, this Bill, as the Senate Judiciary Committee specifically noted (*id.* at 5), would have overturned *Lafayette* and *Boulder*. It would have immunized from antitrust attack the type of ordinance enacted by Berkeley, which is not in violation of the general laws of the state but which has not been approved by the state Legislature. That Bill was changed in Committee, however, so as not to address "the basic application of the antitrust laws to local governments; *Lafayette* and *Boulder* remain unchanged." *Id.* Instead, the Senate Bill made cities immune from civil damages where the local law was "valid under State law." *Id.* at 4.

In the House, a number of Bills were introduced. One would have given antitrust immunity to local governments based either on the nature of the municipal activity or on state "authorization" of the local conduct. H.R. Rep. No. 98-965, 98th Cong., 2d Sess. 13 (1984). Another would have applied a "rule of reason test" to municipalities, along the lines of one suggested by Professor Thomas Campbell.[15] Still another would have created a "municipal rule of reason test slightly different from the one suggested by Professor Campbell. H.R. 5992 would establish a jurisdictional test in which the antitrust laws would not apply to official conduct of a local government 'reasonably undertaken to protect or provide for the public health, safety or welfare.' This standard offers local governments broad protection, but stops short of absolute immunity." *Id.* at 17.

Some of the bills, however, did propose "to put municipalities back in a pre-*Boulder* position by attempting to provide them with the same immunity currently enjoyed by States." *Id.* at 14. The House Judiciary Committee received testimony favoring such immunity, but it

[15] *Id.* "Professor Thomas Campbell suggested that the Subcommittee consider 'legislatively overruling' the *Society of Professional Engineers* case as it relates to units of local and State government by developing a 'municipal rule' of reason test based on a 'less restrictive alternative' analysis." H.R. Rep. No. 98-965 at 16; footnote deleted.

also heard that "immunizing local government units from the antitrust laws would create very strong incentives for the establishment of additional local boards and commissions to set fees, prices, or rates and to establish location, customer or other restrictions in various professions and industries." *Id.* at 9. The Committee felt that "[a]ny legislative solution * * * should weigh the chilling effect of potential or actual antitrust litigation on local governments and their officials against the need to preserve some right of redress for private persons (including consumers) harmed by anticompetitive conduct." *Id.* at 12-13. The Committee recognized that "*Parker* v. *Brown* carries with it the admonition that a State may not immunize private conduct which is violative of the antitrust laws simply by authorizing it" (*id.* at 11), and it repeatedly pointed out that cities *are* subject to antitrust liability under current law unless directed by states to take anticompetitive action. *E.g.*, *id.* at 2, 6-7, 10, 11, 14.

All of the Bills granting antitrust immunity to cities or adopting a Rule of Reason approach were rejected. The Committee's reasoning in doing so is instructive:

> If Congress were confident that the actions of local governments and their officials were always in the public interest or would never work unnecessary anticompetitive injury, it could simply exclude them from the application of the antitrust laws entirely. The record does not support such action at this time. The record does support, however, the notion that municipalities—and their taxpayers who must ultimately shoulder the burden—should not be subject to punitive sanctions in the form of treble damages.
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> The Subcommittee was persuaded * * * that the most balanced legislative response at this time would be to restrict private remedies to injunctive relief. * * *
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> For private plaintiffs, this approach ensures a right of redress through the summary proceeding of

> injunctive relief. * * * Equally important, this remedy approach in no way precludes private plaintiffs from bringing alternative claims that are available and that might afford restitution in money damages for economic harm suffered. [*Id.* at 18-19; footnote deleted.]

In the approved Bill (H.R. 6027), the Committee did provide immunity from *damages* that was broader than that accorded by *Boulder*, in an effort to cover every situation that might develop (*id.* at 20-21), but no immunity from injunctive relief was given at all. As the Committee said, if a plaintiff "has filed suit for injunctive relief under Section 16 of the Clayton Act, that claim would be unaffected by this legislation, which applies only to damage suits pursuant to Section 4, 4A and 4C." *Id.* at 22.

The Conference Committee adopted a compromise Bill which, for the reasons outlined in the House Report, did not grant cities any exemption from the antitrust laws except immunity from civil damages. It made several technical changes in H.R. 6027 not pertinent here, but it also made one significant change in language. The Committee borrowed the phrase, "official action directed by" from *Parker* v. *Brown* and said it intended "that *Parker* and subsequent cases interpreting it shall apply by analogy to the conduct of a local government in directing the actions of non-governmental parties, as if the local government were a state." H.R. Conf. Rep. No. 98-1158, 98th Cong., 2d Sess. 3 (1984). In other words, for private parties to receive immunity, they had to have been "directed" to act as they did by local government *just as the local government had been directed to act by the state.*

The Act itself and its legislative history thus leave no doubt that Congress recognizes and approves the limits the Court has placed on cities in carrying out anticompetitive acts. It has specifically rejected an exclusion of cities from antitrust laws where they are simply acting without violating state law, and it has likewise rejected

a Rule of Reason approach to such cities. For this Court, at this time, to impose a new, liberalized test applicable to cities—either by way of a less restrictive requirement for direction by the state, or by way of a Rule of Reason approach—would move antitrust exemptions beyond the point that Congress wishes them to go.

2. The other danger in relaxing municipal exemption relates to the states themselves. The Court should be very sensitive to the fact that states now know precisely how to exempt cities from antitrust litigation and can easily supply the necessary directive that will accomplish this task. By clearly articulating and expressly approving the anticompetitive conduct at issue and providing for its active supervision, the state automatically exempts its cities under this Court's decisions. If the state has not done so, it should be assumed that there is a reason. There are, in fact, a variety of reasons why a state may not wish to grant such blanket immunity,[16] and for the Court itself to supply the immunity may therefore run directly counter to the intent of the state Legislature. In what would appear on the surface to be an act of deference to states and local governments, the Court would actually be creating state law in defiance of the legislative process in the states.

One of the many reasons why a state might prefer not to grant blanket authority is that contiguous cities—one with rent control and the other without—could unwit-

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[16] These factors are among the reasons why, as the dissent below noted, economists are virtually unanimous in condemning rent control laws. *E.g.*, C. Baird, *Rent Control: The Perennial Folly*, 54-78 (1980); *Rent Control, A Popular Paradox* (Fraser Institute ed. 1975); Muth, *Redistribution of Income Through Regulation in Housing*, 32 Emory L.J. 691 (1983); Rabin, *The Revolution in Residential Landlord-Tenant Law: Causes and Consequences*, 69 Cornell L. Rev. 517 (1984); Lea, *Rent Controls as Income Distribution Policy*, 12 Real Est. Rev. 79 (1982); Navarro, *Rent Control in Cambridge, Mass.*, 78 Pub. Interest 83, 90 (1985) ("On the subject of rent control, the economics profession has reached a rare consensus: Rent control creates many more problems than it solves").

tingly damage the housing market to the disadvantage of consumers in both cities. Renters would flock to the rent-control city, and builders to the control-free city, so that an imbalance would be established having nothing to do with the free flow of competition. These contiguous cities, therefore, would be carrying forward the kinds of "purely parochial public interests at the expense of more overriding state goals" to which the Court referred in *Town of Hallie*, 105 S. Ct. at 1721.

There are additional problems with rent controls. In the short-term, as inflation drives up wages and other prices, rental prices (and therefore rental income) fall behind. Rental units thus become cheaper in comparison to other living quarters. Demand for rental units increases in two ways. First, those already in rental units tend to remain longer than they otherwise would because the units become progressively cheaper in comparison to other prices. Second, consumers who would otherwise be looking for homes look instead for rental units because of the lower prices. A rental space shortage thus develops. Muth, *supra* note 16, at 694-695. Additionally, the effects of the artificially low rental prices will ripple through the home construction and finance industries, as *amici* have demonstrated in their briefs in support of Appellants' Jurisdictional Statement.[17]

The long-term effects of municipal rent control are even more serious. As demand for rental units increases because of the artificially maintained rental price, the supply of units drops because owners find it much less profitable to rent them. Where possible, owners are forced to

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[17] *See also The Report of the President's Commission On Housing* 91-94 (1982) (rent control represents one of the most severe threats to housing production); Hirsch, *From "Food for Thought" to "Empirical Evidence" About Consequences of Landlord-Tenant Laws*, 69 Cornell L. Rev. 604, 609-610 (1984).

As to how rent control causes a significant adverse impact on the property tax burden in a community, see an article by a professor of quantitative methods and a professor of finance, Matthews and Pappas, *Rent Control and Community Impacts*, 44 J. Prop. Mgmt. 265 (1979).

convert the units to condominiums, thus displacing families who cannot afford the purchase prices. If conversion is not possible or feasible, owners are still forced to seek ways in which to ameliorate the effects of rent control.

> Owners do so by gradually withdrawing their capital from the dwellings they own by not making repairs, let alone improvements, in these dwellings. As landlords do so, the effective or quality-adjusted size of rental housing stock tends to decline over time, thus worsening the housing shortage. Not only are more households seeking rental accommodation of a given quality level, but the stock of higher quality rented dwellings tends to decline. Exacerbating the problem, the number of potential renters increases as the city's population grows, while the potential returns to investment in new rental units continues to decline. Even if new units may be exempt from controls, potential investors in rented property may fear that new units will subsequently be made subject to controls, the actual experience in New York City. On both scores—the deterioration of the existing rental stock and the failure to add to it—the long-term effects are far more serious than the initial impact of rent control. [Muth, *supra* note 16, at 695-696.]

As pointed out in the Bay Area Council's Report, *Rental Housing in California: Obstacles & Opportunities* (*see* Appendix H to Appellant's Jurisdictional Statement), in many rent-control areas, "market rent levels have been too low to cover the costs of permanent development financing, particularly in the first year or two after project completion." JS App. A-141. A survey has demonstrated that "[l]enders perceive rent control as being by far the greatest disincentive to investment in the California rental market, and a large majority believe all communities in the state are affected, including those without rent control ordinances." *Id.* at A-142.

Thus, rent controls cause "haphazard and arbitrary allocation of space", create an indefinite continuance of rent ceilings, force the subsidization of new construction, re-

strain the ability of landlords "to sell housing in accordance with their own best judgment exercised in light of market conditions," and discourage or prevent landlords from furnishing services or facilities considered desirable or necessary by their tenants. *Fisher*, JS App. A-83-A-84 (Lucas, J., dissenting). A number of economists have even refuted the commonly-held view that rent control necessarily benefits the poor and minorities. As one of them put it, "rent control is an extremely inefficient and inequitable method of income redistribution." [18]

We point out these factors not as part of a plea against rent controls—because it is not for this Court to judge their efficacy one way or another in the context of this suit—but rather to point out that there are many reasons why states may not wish to direct cities to impose such controls. For this Court to assume that, merely because a state has not forbidden rent controls, it has necessarily embraced them and passed along its power under the Supremacy Clause to municipalities within the state is a very long step indeed—virtually a leap of faith—and one that is both legislative in nature and contrary to fact.

As noted in our Statement of the Case, the State of California has spoken negatively of rent controls. While the state Supreme Court has held that the state Constitution *allows* cities to enact rent control ordinances, what the court is alluding to is merely a general provision permitting cities to exercise their normal police powers and to act for the public welfare. Rent control is nowhere referred to in the state Constitution.

This case is thus a far stronger one against exemption than either *Boulder* or *Town of Hallie*. In *Boulder* the state statute did not address the problem in the case at all; there was merely a general "home rule" delegation

[18] Lea, *supra* note 16, at 82; *see also* Navarro, *supra* note 16, at 97-99. For an explanation of this thesis, see Hemel, *What Does Rent Control Control?*, 2 F. Taxing & Spending 83 (1979). A non-economist has also made the same case. White, *Rent Control Threatens to Impede Spending*, Savings & Loan News, Oct. 1981, at 86, 87.

of power. The city ordinance was therefore struck down because it did not constitute state action. In *Town of Hallie*, the state statute addressed the problem involved there, and specifically allowed action which in turn contemplated the anticompetitive acts. Therefore, the city ordinance was upheld as exempted state action.

Here, no state statute adopts or approves rent controls, and in the instances in which the state has addressed the problem at all, its voice has been one of disapproval. The only way the state could have expressed itself in stronger terms is if it had specifically *prohibited* municipal rent controls in all instances. Since the state is not merely neutral but negative in its attitude toward such controls, there can be no exemption through state action.

Of course, this Court could reject a *per se* approach to the price fixing in this case and, because a city is involved, revert to the Rule of Reason on the theory that the mere assertion of public interest factors takes the conduct out of the more stringent *per se* test. The theory, presumably, would not be one of exemption but simply that a city, asserting the interests of its citizens, necessarily presents factors that should be weighed in the competitive balance. However, such an approach would conflict with congressional intent, as outlined above, and would present enormous difficulties for both plaintiffs [19] and the courts. Added to all of the factors which already must be weighed would be the nature and extent of the asserted public interest and its relative weight in the balance. Nevertheless, because of the problems with rent controls we have already enumerated, it seems clear that in this case no amount of rationalization by the city could offset the counterbalancing, anticompetitive aspects of such controls. Both the short- and long-term effects of

[19] *See* Spiegel, *Local Governments and the Terror of Antitrust*, 69 A.B.A. J. 163, 165 (1983) ("In situations in which the rule of reason defense is expanded to encompass a public interest rationale, this would place a Protean and virtually insurmountable burden on plaintiffs").

rent control adversely impact both the availability and quality of rental housing, and the ripple effects through the housing and finance industries and the consequences on interstate commerce are demonstrably adverse.

Moreover, considering public interest-type factors would run directly counter to prior decisions of this Court. Far more compelling reasons than the ones submitted by the court below have heretofore been rejected as justifications for otherwise illegal conduct under the Rule of Reason. In *National Society of Professional Engineers*, for example, the defendant presented evidence not merely of a good purpose but of danger to the public and actual failures and disasters resulting from the competitive practices against which the assailed rule in that case was directed. Although the Court applied the *per se* rule, it stated that "public interest" factors were not relevant under the Rule of Reason. The justification, said the Court, must relate to competitive considerations; public health, safety and welfare factors could not be taken into account. 435 U.S. at 692. If that test were to be applied here, the Berkeley ordinance would certainly be struck down.

It is extraordinary that the California court should state that its rejection of the traditional Rule of Reason approach would not foreshadow a return to an " 'essentially standardless inquiry into the reasonableness of local regulation.' " JS App. A-28; quoting *Boulder*, 455 U.S. at 67 (Rehnquist, J., dissenting).[20] It is hard to

[20] One of the bases for the majority's conclusion—that Congress could not have intended cities to be subject to treble damages (JS App. A-27)—is of course no longer valid. As noted above, more than two months prior to the decision below Congress passed the Local Government Antitrust Act of 1984, eliminating the possibility of civil damages against cities for violation of the antitrust laws. The California court nowhere referred to the Act, and apparently was not aware of it. It is, of course, highly unlikely that the Department of Justice will ever institute criminal antitrust actions against cities or their officials, absent some added element of criminality or proof of conduct wholly outside the realm of official duties. *See* Note, ***Municipal Antitrust: An Overview***, 60 Chi-

imagine a more standardless inquiry than the one the California court has now set in motion for courts reviewing all municipal regulation otherwise deemed violative of the antitrust laws. What is "a proper local purpose"? How much of a "rational[] relationship" need there be for the city's "legitimate exercise" of its police power, as it relates to the anticompetitive conduct? What would constitute an irrational relationship, or an illegitimate exercise of the police power? When is regulation operating in an "even-handed manner?" For example, where distinctions are made in the treatment of companies or individuals, must these distinctions be judged by rules such as those developed by this Court in a long line of Equal Protection cases, or is some other formula applicable? How would one prove that the city's purpose could be achieved as effectively by other means? What is "a less intrusive impact" on federal antitrust policies, and how would it be demonstrated? These and myriad other questions would entrap the courts in a quagmire of confusion and extended litigation.

Another important issue relates to which law governs these questions—state or federal. Under the California court's formulation, the answer would appear to be state law. That is, the court seems to be saying that since a city acting pursuant to its notion of the public interest is not in conflict with the federal antitrust laws, the state is free to adopt its own test of legality. Such a test would therefore be one under state law, subject to interpretation by state courts; California's unique test, for

Kent L. Rev. 349, 386 (1984). Thus, at worst, a municipality will face injunctive relief if its actions are deemed to violate the antitrust laws, and this is precisely the remedy that Congress has foreseen and approved. *See* H.R. Rep. No. 98-965 at 19, 22.

Similarly, the argument of the California Supreme Court (JS App. A-23) that the ordinance at issue is valid because it has a provision for adjusting prices from time to time in response to changed circumstances has been presented to and rejected by this Court on several occasions—most recently in *Maricopa County Medical Society*.

example, would not be binding on the courts of Massachusetts. On the other hand, the California court purported to construct its test out of federal Commerce Clause precepts.

Does a court apply state or federal law when it addresses the new California test? And even if state law applies initially, does that situation change once the court finds that a city fails to meet the test? That is, since the city would then no longer be immune from application of the federal antitrust laws, do traditional federal rules, such as the *per se* rule and the Rule of Reason, come into play?

These again, are perplexing issues that foretell a decade of litigative problem-solving by the courts—whether those courts be state or federal, or a combination of both.

Our principal point, however, is that neither this Court nor the court below should be engaged in a Rule of Reason analysis of the issues in this case. If a state wishes its cities to take on the mantle of state sovereignty in the area of rent controls, the Court has ruled that the state has the power to do so. Absent such an award of power to the cities by the state, the Court should assume that the state itself has made a judgment that its cities should be judged on the basis of normal antitrust standards. And the normal antitrust standard applied to the conduct engaged in by Berkeley—price fixing—is the *per se* rule. In other words, if the city is to be immunized, the immunization should come from the state, and not the courts.

CONCLUSION

For each of the above reasons—that Congress and California have both rejected a blanket exemption for, and the Rule of Reason approach to, cities—we respectfully urge that this Court do likewise.

Respectfully submitted,

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APPENDICES

APPENDIX A

AGREEMENT TO MEMBERSHIP IN THE COALITION FOR COMPETITION IN APARTMENT RENTALS

The undersigned persons who own rental housing in sections of the State of California in which rent control ordinances are in effect have joined together to form an unincorporated association to be called The Coalition for Competition in Apartment Rentals (the "Coalition") for the purpose of filing an *amicus curiae* brief supporting Appellant's opposition to a California rent control ordinance in the City of Berkeley as more fully described below. We do not intend for the Coalition to engage in any activities not connected with the filing of such a brief and do not consent to any such additional activities. The brief will be filed in the name of the Coalition, but with disclosure of the names of its members.

We consent to having other persons of similar views join the Coalition at any later time.

Membership in the Coalition, unless renewed, shall terminate upon the disposition by the Supreme Court of the United States of docket number 84-1538 entitled *Alexandra Fisher, Marguerite Jacobs, Mort Baker, Richard Lawhorn and Anthony Kenshaw, individuals; and Levin-Zemed, a California corporation, Appellants vs. City of Berkeley, California, a municipal corporation; Berkeley City Counsel; and Berkeley Rent Stabilization Board, Appellees.*

The Coalition has retained Elwood S. Kendrick, Inc. of the firm of Kendrick, Netter & Bennett, Los Angeles, California and E. Barrett Prettyman, Jr., of Washington, D.C., to represent the Coalition in connection with this matter. In joining this Coalition for this limited purpose, unless otherwise agreed, we shall not be responsible for any expenses, specifically including costs and attorneys fees. Any contributions toward such costs and ex-

penses are entirely voluntary and separate from this Agreement.

Each person signing below consents to become a member of the Coalition for the purposes and with the limitations stated.

APPENDIX B

Members of the Coalition for Competition in Apartment Rentals

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